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IN THE
COURT OF APPEALS OF INDIANA

PETER AND MARIA TORRES	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 64A03-0711-CV-533
	)	(64A05-0709-CV-505 consolidated herein)
	)	
SOLID PLATFORMS, INC. ET AL.	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0411-CT-10614

July 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Peter and Maria Torres sued Solid Platforms, Inc. (SPI), L&H Company, Meade Electric Company, Inc. (Meade), and the Estate of William Bales (Bales) for personal injuries Peter received while working for his employer, BP Amoco. The Torreses appeal a grant of summary judgment in favor of the SPI, Meade, and Bales. The Torreses present five overlapping and interrelated issues for review. We condense and restate those issues as follows:

1. Did the trial court err in determining that no material issue of fact existed with respect to the placement of the tent in question?

2. Did the trial court's determination in that regard prejudice the Torreses' subsequent case against SPI and Bales on a separate theory?

We affirm.

The underlying facts of the injury-producing incident are not in dispute. In order to present those facts in a meaningful way, however, we must detail the setting in which they occurred. Peter was an employee of BP Amoco at that company's Whiting, Indiana refinery. The refinery is a sprawling, multi-unit complex. Several of those units were located in the area where this incident occurred. In order to avoid confusion, we will refer to these units simply as Unit 1 (the Distillate Desulfurization Unit), Unit 2 (the Blending Oil Unit), Unit 3 (the Cat Feed Unit), and Unit 4 (the Aromatic Recovery Unit). Amoco employed approximately 120 maintenance employees at the refinery, who were divided into 12 crews. Those crews fell into two categories – (1) capital or large-scale improvements, and (2) routine, day-to-day maintenance. Maintenance groups were assigned to work in certain units at the refinery. Another critical concept to master in understanding this occurrence is what is

termed a “turnaround” (TAR).

A TAR was a major inspection and overhaul of a particular unit; this occurred on a regular basis at the refinery. BP Amoco employees were not involved in the actual TAR work. Instead, outside contractors were hired to perform the TARs. When a TAR occurred, the affected unit was shut down for extensive work, typically involving many people. The process involved transporting all of the necessary machines, tools, and materials to the site. Also, scaffolding was built and temporary structures, referred to by the parties as “huts” or “tents”, were put up and used by the contractors’ workers who were performing the TAR.

Although BP Amoco employees did not perform the TAR work, BP Amoco designated one of its employees to act as a TAR superintendent. This person was responsible for the execution of the TAR and coordinated activities to insure that contractors performing the TAR did not interfere with the safe operation of the remainder of the refinery. The TAR superintendent was also responsible for insuring that the contractors did their work in as safe a manner as possible. For instance, the superintendent made sure that welding was done in an area of the refinery that minimized the risk of fire. The contractors were required to describe to the superintendent the work they would be doing. In fact, a BP Amoco-issued permit was required before work could begin on a TAR. The superintendent had the authority to stop or prevent any work on the TAR if the superintendent believed the work was dangerous to a BP Amoco employee or another contractor.

On the day of the incident, contractors were performing a TAR at Unit 3. In preparation for that work, a tent had been erected that would be the site of fabrication work to be performed in conjunction with the TAR. The fabrication work itself was to be performed

by Meade. The tent in which the work was to be performed, however, was to be erected by SPI. This lawsuit revolves entirely around the placement of that particular tent. For this reason, we will examine that subject in detail. BP Amoco had given Meade a list of work that was to be done. Meade's foreman on the TAR project, Mitch Kormendy, inspected the job site and determined Meade's requirements, not only in terms of materials and equipment needed, but also regarding where the work would be staged. Kormendy requested that a tent be erected for Meade to, among other things, store its electrical equipment. He chose a location where he wanted the tent to be placed. Through Kormendy, Meade placed a requisition order with BP Amoco requesting that the temporary tent be erected. BP Amoco supervisory personnel, the chief operator of the unit, inspected the proposed location to determine whether that site was a safe place to erect the tent. BP Amoco's approval was required before the tent could be placed there. BP Amoco gave that approval and then directed SPI to erect the tent in the designated location. SPI did so.

On January 23, 2003, Peter, a pipe fitter, was working at Unit 2. After Peter finished his work at Unit 2, he set off on a bicycle westbound down a four-foot-wide path to return to Unit 1. He would take that path to West Road, a private, north-south road that ran through the refinery. West Road was used for two-way traffic, but had no lane markings. Peter would turn north, or right, and take West Road back to Unit 1. The tent, which was approximately ten feet high, was located on the near right quadrant of this "intersection", and obstructed Peter's view of West Road to Peter's right; the view to the left at that point was unobstructed. As Peter neared West Road, he looked to his left and saw that it was clear. Without stopping, he turned right, or north, onto West Road. At the same time, William

Bales, an SPI employee, was operating a forklift southbound on West Road. Bales was from Peter's vantage point behind the tent and out of view. Peter's bicycle struck the forklift and Peter was thrown from the bicycle, suffering personal injuries.

The Torreses filed a personal injury lawsuit against Meade, SPI, William Bales, and L&H Company.[1] The allegations of negligence against each defendant were that Bales was negligent in operating the fork lift, SPI was responsible through respondeat superior for Bales's negligent operation of the fork lift and was also negligent for placing the tent where it did; Meade was negligent for placing the tent were it did. On July 14, 2006, Meade filed a motion for summary judgment arguing, among other things, that it did not owe a duty to Peter with respect to placement of the tent. That motion was granted and Peter herein appeals that ruling. SPI also filed a motion for summary judgment, alleging that it had no control over where the tent was placed. The trial court granted partial summary judgment in favor of SPI on that issue, ruling that BP Amoco ultimately had the authority to determine where the tent should be placed. The only remaining claim of negligence at that point was against Bales and SPI and involved the alleged negligent operation of the forklift. A jury trial was held as to that issue and those parties and the jury returned a verdict in favor of Bales and SPI. In this appeal, the Torreses appeal the grant of summary judgment in favor of Meade, the grant of partial summary judgment in favor of SPI, and the jury verdict in favor of Bales and SPI.

1.

[1] L&H Company is not a party to this appeal.

The Torreses contend the trial court erred in granting summary judgment in favor of both Meade and SPI for negligent placement of the tent.

In a nutshell, the Torreses' lawsuit involved two allegations of negligence. The first, against SPI and Bales, centered upon the operation of the forklift and was based upon the claim that Bales was operating the forklift left of center when Peter rounded the corner and struck it. The second allegation of negligence concerned the placement of the tent. The Torreses contend the tent obstructed Peter's view at the corner where he turned onto West Street, and thus that it was negligently placed. They sued SPI and Meade upon that theory, alleging those parties were responsible for determining where the tent would be erected. SPI and Meade denied the allegation, contending that BP Amoco made the decision regarding where the tent would be placed. Thus, SPI and Meade sought, and ultimately received, summary judgment on that basis. We begin our analysis with this question.

Our standard of review for a trial court's grant of a motion for summary judgment is well settled:

> Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case.
>
> When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the

> nonmovant, and resolve all doubts against the moving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.
>
> A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment for the appellees, such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*. When, as here, the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action. *Dible v. City of Lafayette*, 713 N.E.2d 269 (Ind. 1999).

We may decide the issue of whether summary judgment was appropriate by focusing on one question: does a question of fact exist with respect to which party or parties exerted control over the placement of the tent? The trial court concluded, "SPI simply constructed the Tent at the location prescribed by Meade, pursuant to final control and approval by the owner of the premises, BP Amoco/Amoco." *Appellant's Appendix* at 254. SPI claimed it simply erected the tent where Meade directed. That appears to be customary arrangement at the refinery, i.e., Meade indicates that it needs a tent or scaffolding or the like built at a certain location, and SPI builds or erects it. The Torreses contend, however, that there is a question of fact on this point. They explain:

> In particular, a Work Order … was introduced showing the erection of this shelter. The date is indicated as January 20, just 3 days before the incident in question. *However, the space for designation of "location" is left blank.* SPI

> has identified no person with knowledge of how the SPI employees who erected the structure actually came to place it in that particular location.

Appellant's Brief at 4. It would appear, then, that the allegation that SPI was at least partly responsible for placing the tent where it did was based upon the argument that the blank line for "location" permitted a reasonable inference that the location was left to SPI's discretion when the work order was placed. We note, however, that there is among other things designated evidence to the effect that Kormendy, Meade's foreman, acknowledged that he chose that location for the tent, pending BP Amoco's approval. That statement was consistent with other designated evidence indicating that such was the customary procedure between Meade and SPI at the refinery. We must agree with the trial court that in light of such designated evidence, the blank line did not create a question of fact as to whether SPI was at least partly responsible for determining that the tent should be placed where it was. The trial court did not err in granting partial summary judgment in SPI's favor on this point.

We turn now the existence of a question of fact with respect to whether Meade was at least partially responsible for the placement of the tent. Both Meade and the Torreses acknowledge that the pivotal question here involves control – in this case, control of the decision where to place the tent. As the Torreses so aptly point out, "'[T]hread through the law imposing liability on occupancy or ownership of the [sic] premises is control.'" *Appellant's Brief* at 11 (quoting *Pelak v. Indiana Indus. Servs.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005), *trans. denied)*. In *Bethlehem Steel Corp. v. Lohman*, 661 N.E.2d 554 (Ind. Ct. App. 1995), a case cited by both parties on this question, this court discussed the concept of duty where the instrumentality causing the injury is in the control of the independent

contractor while working on the property owner's property. In *Bethlehem*, the property owner hired an independent contractor, who in turn brought a crane onto the owner's premises to perform its work. A man was injured while working on the crane and the injured man sued the property owner. We noted that a landowner has no duty to provide an independent contractor with a safe place to work, although there is a duty to the independent contractor's employees to keep the premises in a reasonably safe condition. If, however, the instrumentality that caused the injury is in the independent contractor's control, "the complainant must show either that the landowner assumed control of the instrumentality or had superior knowledge of the potential dangers involved in its operation; otherwise, the landowner owes no duty to the contractor's employee." *Id*. at 556. The Torreses contend the following aspect of *Bethlehem* is analogous to the instant case:

> Like BP Amoco, Bethlehem Steel hired a number of independent contractors to do certain work at its vast Burn Harbor plant. One subcontractor, Manitowoc, provided cranes. Mr. Lohman was injured when a fire broke out in the crane. The Court on appeal held that, although there was evidence that Bethlehem had "ultimate control" over its premises, including the timing of the repair work and the actual location of the crane, it clearly exercised no actual control over the subcontractor in its repair and maintenance of the crane.

Appellant's Brief at 12. Thus, the Torreses contend, the analysis "always turns on whether the landowner exercised actual control." *Id*. We agree that the issue of duty here depends upon the element of control. Specifically, the question whether Meade owed a duty to Peter with respect to the placement of the tent hinges upon whether BP Amoco controlled that aspect of the job site.

We note at this point that a controversy has arisen between these parties with respect to the difference, if any, between "final control" of the premises and "actual control" of the premises. In its order granting summary judgment in favor of Meade, the court stated,

> But the evidence presented to the Court thus far clearly demonstrates that BP/Amoco maintained and assumed *final* control of the premises. Therefore, as the landowner who assumed control of the instrumentality of its contractors, potential liability in a negligence action attaches to BP/Amoco – and under the law, the Defendants are relieved of such duty as they never attempted to control the premises or held out as having the authority to make decisions relating to the placement of structures on said premises.

Appellant's Appendix at 260 (emphasis supplied). The Torreses contend "this is the same analysis as the 'ultimate control' language used in *Bethlehem Steel v. Lohman*, *supra*, and which has been rejected by all the above cited cases." *Appellant's Brief* at 14. We do not find the phrase "ultimate control" in the *Bethlehem* opinion. We do, however, find a discussion indicating that a landowner's control in this context must be exercised, i.e., active, not passive. No doubt, this is what the Torreses are getting at when they state: "To suggest that BP Amoco 'could have' exercised control is only to describe the relationship between the general contractor and a subcontractor or the landowner and a subcontractor. It does nothing to support the theory that BP Amoco did, in fact, exercise actual control … of the placement of this Tent." *Id.* We agree with this interpretation of *Bethlehem Steel*. We also agree with the parties that the instant case may be resolved by the application of the principles enunciated in *Bethlehem Steel*. That is, in order to conclude that Meade had no duty to the Torreses with respect to the placement of the tent, we must find that BP Amoco "assumed control over the means and manner," *Bethlehem Steel v. Lohman*, 661 N.E.2d at 558, of the injury-producing aspect of the tent, which was its location.

This brings us to the heart of the matter. The Torreses contend the designated evidence does not conclusively establish that BP Amoco exercised such control, while Meade contends that it does. The designated evidence on that question is as follows. Meade's general foreman, Kormendy, testified that after BP Amoco gave Meade a list of jobs Meade was to perform, Kormendy would walk the job site with a BP Amoco representative and determine where different support structures such as the tent in the instant case needed to be built. Kormendy testified that Meade needed the permission of the CO, or chief operator, of Unit 3 to place a tent at a certain location on that site. Kormendy explained that he submitted a verbal request to BP Amoco personnel in the control room asking the CO of Unit 3 for permission to erect the tent. Kormendy related that Meade wanted to "have this fabrication tent built. And if he or the – someone could come out -- the CO or someone could come out and make a decision if it would be all right to place it here, or have it assembled here (meaning the location where it ultimately was placed]." *Appellees' Joint Appendix* at 726. Kormendy and the aforementioned BP Amoco personnel then walked to the site where Meade wanted the tent to be built and Kormendy explained what he wanted. A few days later, Kormendy spoke with an SPI supervisor and told him Meade was "going to have a tent possibly built here to let him know, so that he would be prepared." *Id*. at 731. The tent was built several days later.

Kormendy's testimony about the process of erecting the tent on the indicated location was consistent with that of other principals from BP Amoco, Meade, and SPI. According to Pete Bauer, BP Amoco's Safety Director, BP Amoco "would have told someone to put up that shelter there, the contractors would not do that on their own." *Id*. at 445. Victor

Venturini, BP Amoco's Plant Maintenance Supervisor, testified that BP Amoco could order that a structure such as the tent be moved or torn down if it was deemed to be unsafe by BP Amoco. Jeffrey Spies, Site Manager for Meade at the refinery, testified:

> Generally, on a turnaround, Bob Vargo [a BP Amoco employee] would be our direct contact. He handles the electrical portion of the turnaround. So we could go to Bob and say that we need a shanty constructed and at that time we would tell him the vicinity that we would want it and at that time he goes to operations. There would be somebody from the BP Amoco operations that would come out there, verify where we put it that it is okay. And it would be erected from there. Under no circumstances do we erect or have anything erected without BP authorizing that.

Id. at 208-09.

The Torreses contend they designated evidence that calls into question whether, in fact, the aforementioned procedures were followed in this case, and specifically contend there remains a question of fact as to the identity of the BP Amoco supervisor who authorized the placement of the tent. With respect to the former claim, we can find no evidence that tends to negate Meade's assertion that it followed the normal, even required, procedure and obtained BP Amoco's approval before SPI erected the tent where it did. The assertion that sometimes the procedures were not followed in other cases does not tend to prove they were not followed in the instant case. Having thus negated one element of the Torreses' cause of action, i.e., duty, Mead was entitled to summary judgment.

2.

The Torreses contend "[t]he court's determination and order on summary judgment caused prejudice at trial because the jury was not allowed to allocate fault with regard to the vision obstruction caused by the Tent." *Appellant's Brief* at 21. In essence, this argument is

that the erroneous grants of summary judgment negatively affected the Torreses' case in the jury trial involving SPI and Bales. Obviously, the Torreses could not succeed on this argument without prevailing on issue 1 above. Having affirmed summary judgment and partial summary judgment in favor of Meade and SPI, respectively, we necessarily reject this argument as well.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur